

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1996

<b>JOHNNY EUGENE JOHNSON,</b>	)	<b>C.C.A. NO. 01C01-9508-CC-00247</b>
	)	
Appellant,	)	
	)	
<b>VS.</b>	)	<b>MONTGOMERY COUNTY</b>
	)	
<b>STATE OF TENNESSEE,</b>	)	<b>HON. JOHN H. GASAWAY</b>
	)	<b>JUDGE</b>
	)	
Appellee.	)	<b>(Post-Conviction Relief)</b>

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OPINION FILED \_\_\_\_\_

AFFIRMED

JERRY L. SMITH, JUDGE

## OPINION

Appellant, Johnny Eugene Johnson, appeals from the dismissal of his petition for post-conviction relief. Appellant is serving an effective twenty year sentence following his conviction on two counts of aggravated rape and two counts of aggravated sexual battery. This conviction was affirmed on direct appeal. State v. Johnson, No. 01C01-9107-CC-00194, 1992 WL 25006 (Tenn. Crim. App. Feb. 14, 1992), perm. to app. den., (Tenn. 1992). In this, his first post-conviction petition, filed February 10, 1993, Appellant claims his trial attorney rendered ineffective assistance of counsel. He also asserts that his case should be remanded to the trial court for reconsideration in light of the recent United States Supreme Court case of Tome v. United States, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). For the reasons discussed below, we reject the Appellant's contentions and affirm the decision of the trial court.

This case arises out of sexual offenses committed against the eleven-year-old sister<sup>1</sup> of Appellant's then girlfriend, Kathy Williams. The record reflects that the convictions were for two separate incidents-- one which occurred in the summer of 1988 and the other in December of that same year. Along with the trial attorney, Appellant and Ms. Williams were the only witnesses who testified at the post-conviction hearing. Throughout the Appellant's testimony, he cited many instances which he thought were examples of his trial counsel's failure to adequately investigate the facts and circumstances of his case thereby preventing the jury from hearing potentially exonerating evidence. In addition,

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<sup>1</sup>Consistent with the policy of this Court, we will not identify the victim by her name as she was a minor at the time of the alleged offenses.

Appellant asserted that this trial attorney promised the jury during his opening statement that he would pursue a certain line of defense. However, Appellant testified that his attorney failed to pursue or substantiate that defense as the trial progressed thereby rendering ineffective assistance of counsel.

The trial court summarily denied the post-conviction petition. In doing so the trial judge failed to state any findings of fact and conclusions of law as is required by Tennessee Code Annotated Section 40-30-118(b) (1990) (repealed by Tennessee Code Annotated Section 40-30-211(b) (Supp. 1996).

It is the duty of the trial court, not the appellate court, to weigh and evaluate the evidence and to resolve conflicts in the testimony concerning the credibility of the witness. Black v. State, 794 S.W.2d 752,755 (Tenn. Crim. App. 1990). Factual issues raised by the evidence must be resolved by the trial court and placed in appropriate findings of fact. Absent such findings, it would ordinarily be inappropriate for us to determine contested factual issues from a printed record. Tate v. State, No. 02C01-9108-CR-00170, 1992 WL 105959, at \*3 (Tenn. Crim. App. May 20, 1992), perm. to app. den., (Tenn. 1992).

However, this Court has held that even if the trial court fails to comply with this duty, a reversal is not warranted if the record sufficiently reflects the apparent reasons for the trial court's actions so as to allow for meaningful appellant review. State v. Swanson, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984). A review of this record convinces us that the reasons for the trial judge's dismissal of the post-conviction petition are apparent, and we will therefore address the issues on the merits.

The standard of review for a claim involving the Sixth Amendment right to effective assistance of counsel was set out in Baxter v. Rose, which required this Court must determine whether the advice given or services rendered by the attorney are within range of competence demanded of attorneys in criminal cases. 523 S.W.2d 930 (Tenn. 1975) To prevail on a claim of ineffective assistance of counsel, a petitioner must show that his or her counsel's representation fell below the objective standard of Baxter and, additionally, that this sub-standard representation prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is shown by demonstrating a reasonable probability that the result of the proceedings would have been different. Id. at 693. "The probable result need not be an acquittal. A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in Strickland." State v. Zimmerman, 823 S.W.2d 220, 225 (Tenn. Crim. App. 1991) (citing Chambers v. Armontrout, 907 F.2d 825, 832 (8th Cir. 1990)).

We begin our analysis of this case with one of Appellant's alleged incidents of ineffectiveness which may be dismissed merely by reference to other evidence in the record. Much of Appellant's testimony involved his attorney's failure to show that because Appellant was at work and not at home on the night of July 4th, he could not have committed the offenses which took place in the summer of 1988. He asserted that Opryland co-workers as well as time cards from his job would have supported this defense. Furthermore, Ms. Kathy Williams testified at the hearing that she would have testified at the trial that she telephoned Appellant at work on the night of July 4th, proving that he was indeed there. However, the trial attorney testified that the victim never gave a specific date, or

day of the week, or month for the offenses occurring in the summer of 1988. Instead, the victim testified at the trial that the offenses occurred some time between the time she got out of school and the 4th of July. Thus, if the trial attorney's testimony on this point was accredited by the trial judge, as it apparently was, an alibi for the specific date of July 4th would have been, at best, only marginally helpful to the defense. Reconciliation of conflicting testimony is the exclusive function of the trial court, and this Court will not disturb that determination on appeal. Black, 794 S.W.2d at 755. It thus appears that Appellant has failed to demonstrate deficient performance of counsel or prejudice from the decision not to present this weak alibi defense.

Next we address Appellant's claims that trial counsel's performance was constitutionally deficient because the attorney did not introduce an electric bill which would allegedly have shown that the lights had been turned off in the mobile home where the rape took place. Apparently Appellant was of the opinion rape could not be accomplished in the dark. In addition Appellant complains of his lawyer's decision not to cross-examine the eleven-year-old victim concerning an allegedly unusual scar on his penis. Appellant asserted that the victim's inability to identify the scar would suggest she was lying. These lines of argument are rather inconsistent. Assuming an eleven-year-old rape victim would notice a penile scar is doubtful even if the lights were on during the rape. If in fact the lights had been turned off and the sexual assault carried out in the dark, observation of this alleged scar would be even less likely. Given the inconsistent nature of these points concerning the penile scar and the darkness of the rape scene and their dubious utility, counsel's decision not to pursue these matters was a valid tactical choice. This Court will not second-guess valid

strategic and tactical choices made by counsel, and counsel will not be deemed ineffective even if a different strategy might have produced a different result. Hellard v. State, 629 S.W.2d 4,9 (Tenn. 1982) citing United States v. DeCoster, 487 F.2d 1197 CD.C.Cir. 1973); Williams v. State, 599 S.W.2d 276, 280 (Tenn. Crim. App. 1980).

Another ground of alleged ineffectiveness relates to Appellant's claim that the victim suffered from certain diseases. It was Appellant's position that proper investigation could have proven him innocent by showing that he did not have the same diseases. A doctor's letter indicating that the victim had displayed herpes on her lips in a 1985 medical examination was the only record evidence of these diseases at the post-conviction hearing. The trial attorney testified that due to an allegation that Appellant forced the victim to perform oral sex, the attorney explored the idea of showing Appellant was free of this disease in order to exonerate him. However, the trial attorney decided not to pursue this line of defense after talking to a doctor who opined that even if the victim had outward manifestations of herpes on her mouth in 1985, she would not necessarily be highly contagious three years later in 1988. On appeal, Appellant asserts that the attorney should have sought a second opinion, however the attorney testified that he trusted this doctor. Appellant has presented no evidence, either medical or otherwise, in support of his theory that the victim's medical condition in 1988 was a basis for exonerating him. Appellant has failed to show counsel's performance was deficient on this point and that he suffered any prejudice from the decision not to present the victim's medical condition.

Two of Appellant's grounds for ineffective assistance arose out of his belief that he had been wronged by the Department of Human Services (DHS). Specifically, he referred to certain tapes which, as the trial attorney explained, were of home visits that DHS had with Ms. Williams regarding the sexual molestation of her own child by Appellant. It was Appellant's position that overzealous DHS employees had put ideas into the child victim's mind. However, the attorney testified that after listening to these tapes, he found them insufficient to support this theory. These tapes were not made a part of this record and there was no other evidence imputing such behavior to DHS. Therefore, Appellant has not met his burden of proving this allegation.

Also with regard to DHS, there was testimony from both Appellant and Ms. Williams that DHS workers had told Ms. Williams that if she testified, she would not regain custody of her daughter. However, further testimony revealed that the reason that Ms. Williams' daughter was in DHS custody in the first place was Appellant's alleged molestation of that child. When Appellant's trial attorney testified, he explained that although DHS did attempt to make Ms. Williams understand the implications of aligning herself with a person accused of molesting her child, DHS workers did not threaten her.

We next turn to Appellant's claim that trial counsel was ineffective when he promised the jury a defense in opening statement, but then failed to substantiate the defense during the course of the trial. Appellant's trial attorney acknowledged that in opening statements he had stated the defense would show through the testimony of Ms. Williams that the victim had recanted her allegations that Appellant had raped her. At that time the lawyer was under the impression that

one of Appellant's former attorneys would confirm the victim had recanted at the former attorney's office. However, during the trial Appellant's lawyer learned from the previous attorney that although Ms. Williams had brought the victim to his office for the express purpose of a recantation, none had taken place. Ms. Williams nevertheless wanted to testify that she had taken the victim to Appellant's former attorney for a recantation. Appellant's trial attorney felt Ms. Williams would be subject to intense cross-examination concerning her relationship with Appellant, and thus might ultimately hurt Appellant's case.

Appellant relies upon State v. Zimmerman, 823 S.W.2d 220, 225-26 (Tenn. Crim. App. 1991), in which this Court found that a trial lawyer's failure to produce evidence proffered during the opening statement deprived the defendant of a meaningful defense when it occurred along with other incidents of deficient performance. In Zimmerman, trial counsel prepared the jury during his opening statement for a defense based upon the battered wife syndrome. Id. at 225. After the defendant was described as an abused woman, the jury was told that they would hear from her as well as a psychologist who had treated her. Id. However, defense counsel suddenly changed strategy with no apparent reason and never presented the promised course of defense.

Admittedly, it is rarely wise to promise a jury evidence that cannot be delivered. However, Zimmerman does not mandate that every unfulfilled promise of defense counsel in opening statement warrants a finding of ineffectiveness. In Zimmerman the defense attorney made an arbitrary decision to abandon a line of defense which the proof at the new trial hearing demonstrated could have been amply substantiated. In addition, the finding of ineffective counsel in

Zimmerman rested upon the cumulative effect of several serious errors in trial counsel's judgment. Zimmerman, 823 S.W.2d at 228. In this case, Ms. Williams had apparently led defense counsel to believe that the victim had recanted her allegations in front of Appellant's previous attorney. Sometime prior to trial defense counsel talked with the former attorney about the alleged recantation and received the impression that the former attorney could corroborate that in fact the victim had recanted. It was only after the former attorney told the defense attorney at trial, after the opening statements, that the victim had not recanted that defense counsel elected to abandon this line of defense. This is hardly the inexplicable decision to abandon a supportable defense that this Court encountered in Zimmerman. Further, for the reasons stated previously, other alleged instances of deficient representation were valid strategic or tactical choices, and therefore do not cumulate, as in Zimmerman, to establish ineffective assistance of counsel.

Finally, we address Appellant's claim with regard to Tome v. United States, 115 S. Ct. 696 (1995). In that case, the United States Supreme Court decided a question regarding Federal Rule of Evidence 801(d)(1)(B) which provides that prior consistent statements are non-hearsay if they are "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Id. at 701. The Court held that such out-of-court consistent statements are admissible only if they are made before the alleged fabrication or before the improper influence or motive arises. Id. at 705. In his brief, Appellant asserts that this case stands for the proposition that conviction for child sexual abuse cannot stand if it is based primarily on the word of an alleged victim that

has a pre-accusation motive to lie. In our opinion, Appellant has misinterpreted Tome which has no application to the present case.

“In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] petition by a preponderance of the evidence.” McBee v. State, 655 S.W.2d 191,195 (Tenn. Crim. App. 1983) citing Clenny v. State, 576 S.W.2d 12,14 (Tenn. Crim. App. 1978). After a review of the record, we find that Appellant has failed to meet his burden. Accordingly, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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WILLIAM S. RUSSELL, SPECIAL JUDGE